SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 620

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY IN OPPOSITION.

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INDEX

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Statement of the Case	2
Argument	10
Conclusion	16

Table of Citations

Cases:

Bernhardt v. *Polygraphic Co.*, 350 U.S. 198 (1956)	12
Brotherhood of Locomotive Fire. & Eng. v. *Chicago, B & O. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F.2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964)	3
Brotherhood of Railroad Trainmen v. *Chicago, M., St. P. & P. R. Co.*, 237 F. Supp. 404 (D. D.C., 1964)	5, 15
Brotherhood of Railroad Trainmen v. *Chicago, M., St. P. & P. R. Co.*, 345 F.2d 985 (D.C. Cir., 1965)	5
Brotherhood of Railroad Trainmen v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, —F.2d—, 55 CCH Labor Cases, ¶11,931 (D.C. Cir., 1967)	9
Brotherhood of Railroad Trainmen v. *St. Louis Southwestern Railway Co.*, — F.2d —, 55 CCH Labor Cases ¶11,928 (D.C. Cir., 1967)	9
Cadby v. Savoretti, 242 F.2d 751 (5th Cir., 1957)	14
Chicot County Dist. v. *Bank*, 308 U.S. 371 (1940)	13
Commercial Solvents Corp. v. *Louisiana Liquid F. Co.*, 20 F.R.D. 359 (S.D. N.Y., 1957)	12

Cases—Continued

Coulston v. *United States*, 51 F.2d 178 (10th Cir., 1931) 12
Griffin v. *Illinois*, 351 U.S. 12 (1956) 12
Herring v. *Kennedy-Herring Hardware Co.*, 261 F.2d 202 (6th Cir., 1958) 14
Locomotive Engineers v. *B. & O. R. Co.*, 372 U.S. 284 (1963) 2
Miller v. *United States*, 317 U.S. 192 (1942) 14
Petition of Brink, 98 F. Supp. 135 (E.D.N.Y., 1951), aff'd, 193 F.2d 1009 (2d Cir., 1952) 12

Constitution, Statutes and Rules:

Fifth Amendment to Constitution of the United States 10, 11, 12
28 U.S.C. § 753 12
Public Law 88-108 (77 Stat. 132) 2, 3, 5, 8, 10, 13

Railway Labor Act:

Section 6 2
Section 7 ..... 9, 10, 12, 13
Section 8 ..... 5, 9, 10, 12, 13
Section 9 ..... 3, 8

Rule 21(1) of the Supreme Court 14
Rule 75(c) F.R.Civ.P. 14

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Opinions Below

The opinion of the Court of Appeals (App. B of Petition), not yet officially reported, is unofficially reported at 56 CCH Labor Cases ¶12,090. The opinion of the District Court (App. A of Petition) has not been reported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether the answer by Arbitration Board No. 282 to BRT Questions No. 32(a) and (b), that a special board of adjust-

ment established under Arbitration Award No. 282 did not deprive petitioner of the minimum essentials of a full and fair hearing, may be impeached under Section 9 of the Railway Labor Act as incorporated into Public Law 88-108 on the ground that the special board of adjustment was required by statute or by the due process clause of the Fifth Amendment to the Constitution to provide petitioner with a free transcript of its proceedings?

Statement of the Case

In November of 1959, most of the nation's Class I railroads served five unions (including petitioner) with notices under Section 6 of the Railway Labor Act (45 U.S.C. §156) of proposed changes in a number of obsolete rules which were causing serious overmanning of trains. One of the proposals thus made was to abolish all rules requiring the use of trainmen (such as brakemen and helpers) in road and yard service, and to permit management in its discretion to determine the number of such trainmen to be used. In September of 1960, the unions served the railroads (including this respondent) with Section 6 notices of various counter-proposals, including a proposal by petitioner to establish a rule requiring the use of at least two trainmen on all crews in road and yard service. The parties exhausted the "major" dispute procedures of the Railway Labor Act (45 U.S.C. §§151-160) without settling this dispute, and thus were in a position to resort to self help including strikes by the unions. See *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

To prevent such a disaster, Congress enacted P.L. 88-108 (77 Stat. 132). That statute committed the crew-consist issue raised by those aspects of the Section 6 notices referred to above and another issue involving the use of locomotive firemen to final and binding arbitration by an arbitration board commonly known at Arbitration Board No. 282.

Section III of the Award (JA 20-25) by Arbitration Board No. 282 related to the crew-consist issue. It provided, among other things, that no change could be made in existing rules requiring a stipulated number of trainmen to be used on crews in road and yard service except by agreement or pursuant to the procedures established by the Award. In general, those procedures permitted either a carrier or a union to serve the other with written notice of proposed changes in rules requiring a stipulated number of trainmen, provided that they should confer and attempt to reach agreement upon such proposals in the light of "guidelines" or standards specified in the Award, and provided that, if no agreement was reached, the dispute could be submitted by either party to a special board of adjustment (composed of one representative of the carrier, one representative of the union and a neutral member) for final decision, pursuant to those guidelines.

Petitioner and three other unions filed petitions to impeach the Award, pursuant to Section 9 of the Railway Labor Act (45 U.S.C. §159) as incorporated by Section 4 of P.L. 88-108, contending that the Award did not comply with P.L. 88-108, was unconstitutional and was otherwise invalid. The validity of the Award was upheld, however, in a decision that has become final. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D. D.C., 1964), aff'd *per curiam*, 331 F.2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964).

The crew-consist provisions of the Award became effective on January 25, 1964. On March 10, 1964, this respondent served petitioner with two written notices under Article III of the Award proposing to change from two to one the stipulated number of helpers on 162 yard assignments and to eliminate the baggageman on seven passenger trains. After negotiations between the parties failed to bring about an agreement, respondent requested the establishment of a

special board of adjustment with respect to the baggagemen notice on April 21, 1964 and with respect to the yard-crew notice on May 1, 1964. A special board of adjustment was established to hear the dispute, on May 18, 1964, when the neutral member was appointed by the National Mediation Board. Section III-B(3) of the Award provides (JA 22) that: "Decisions of the special board of adjustment shall be rendered within 60 days after the appointment of the neutral member."

The special board of adjustment held an organizational meeting on May 28, 1964, and commenced its hearings on June 1, 1964. During the meeting on May 28, petitioner asked whether a transcript of the proceedings would be made, and was informed that it could have one made at its own expense, if it wished. Neither party arranged for a transcript to be made. The hearings continued on every week day until June 29, 1964, except for June 3 and 4 and part of June 17. Shortly after receiving respondent's notices of March 10, 1964, petitioner distributed questionnaires to its members who worked on the crews involved concerning the operation of those crews. No further effort was made by petitioner to prepare for the hearings until the initial meeting of the special board on May 28, 1964. Nevertheless, petitioner submitted more than 400 completed questionnaires and presented testimony by live witnesses relating to practically every assignment at issue. Extensive written and oral evidence also was submitted by this respondent. The special board allowed four days, between June 29 and July 2, 1964, for oral argument, but such argument was waived by the parties.

The special board of adjustment issued its awards on July 10, 1964. Thereupon, petitioner filed an action in the United States District Court for the District of Columbia to enjoin this respondent from putting the awards into effect. Numerous issues were raised, most of which concerned the

fairness of the hearing before the special board, including a contention that petitioner was deprived of due process of law because the special board did not have its proceedings transcribed and make a transcript available without cost to petitioner. After an extensive trial before the Honorable Spottswood W. Robinson, III, the complaint was dismissed on the merits in accordance with findings and conclusions reported in *Brotherhood of Railroad Train.* v. *Chicago, M., St. P. & P. R. Co.*, 237 F. Supp. 404 (D. D.C., 1964).[1] Upon appeal by petitioner, the judgment in that case was vacated and the case was remanded "with instructions to dismiss the complaint without prejudice to such further application to Board 282 as any party may choose to make." *Brotherhood of Railroad Train.* v. *Chicago, M., St. P. & P. R. Co.*, 345 F.2d 985, 988 (D.C. Cir., 1965). In essence, the Court of Appeals held that the complaint raised issues which were within the jurisdiction of Arbitration Board No. 282 to decide, pursuant to Section 8(m) of the Railway Labor Act (45 U.S.C. §158(m)) as incorporated by Section 4 of P.L. 88-108.

Following the remand, petitioner submitted several questions to Board 282, including those denominated as BRT Questions No. 32(a) and (b), which read as follows (JA 36-37):

> "(a) Whether the Awards issued by Referee K. P. O'Gallagher, which permitted the Chicago, Milwaukee, St. Paul & Pacific Railroad Company to reduce the crews on 162 out of 312 job assignments plus eliminate

[1] The record compiled before Judge Robinson was made available, by stipulation of the parties, to Board 282 in connection with its consideration of BRT Questions No. 32 (a) and (b), and to the lower courts in connection with their consideration of the petition to impeach those answers. The factual statements made in the foregoing paragraphs of this Statement of the Case are based upon that record, unless otherwise indicated.

seven baggagemen assignments, followed the guidelines established by Board 282.

"(b) Whether the hearing conducted before the Special Board of Adjustment appointed by the National Mediation Board pursuant to Public Law 88-108, Referee K. P. O'Gallagher presiding, was held under circumstances that deprived the BRT of procedural due process of law, thus nullifying the awards."

On December 12, 1965, Board 282 answered those questions together, as follows (JA 37):

"To answer these questions and to provide 'meaningful review' as we have defined that term in our Preliminary Statement in respect to B.R.T. Questions 32, 33, and 36, we have examined the entire record made before Judge Robinson. This record consists of all of the exhibits submitted to the Special Board of Adjustment and the referee's notes, plus oral arguments made by counsel to Judge Robinson. In addition, we have had the benefit of oral and written arguments made by counsel to Arbitration Board 282. As explained in our Preliminary Statement, we think it outside the boundaries of 'meaningful review' to pass judgment on the merits of these awards. Rather, we have examined the record to determine whether it was sufficient to permit awards based on the guidelines and whether the B.R.T. was afforded a full and fair hearing. The record is voluminous; it includes detailed written surveys, findings, and allegations by both parties in respect to all the jobs covered by the carrier's notice. The referee asserted that the awards were based on the guidelines, and he so testified before Judge Robinson. We can find nothing in the record which would justify a conclusion that the awards were governed by any other considerations.

"On the question whether the B.R.T. was denied a

full and fair hearing, we conclude from our study of the record that the alleged procedural irregularities, considered singly or together, did not deprive the B.R.T. of the minimum essentials of a full and fair hearing."

In the Preliminary Statement in respect to BRT Questions No. 32, 33 and 36, issued on October 10, 1965 and referred to in the above quoted answer to BRT Questions No. 32(a) and (b), Board 282 stated, among other things, that (JA 34-36):

"At the outset, we wish to emphasize that, in our judgment, a 'meaningful review' in the context of Award 282 is not a trial de novo. As we have repeatedly stated, our purpose in providing for special boards of adjustment was to bring about prompt and final settlement of disputes over crew consists. We recognized that these disputes were complex and varied, and that they could be equitably resolved only after a careful and detailed examination of local conditions and the application of the guidelines laid down in the Award. A trial de novo, following an appeal to Board 282 from the decision of a special board, would thus defeat the entire purpose of our decision.

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"In our judgment the applicable standards in this case are those specified in Award 282, and 'meaningful review' involves neither more nor less than a determination whether a challenged decision by a special board has followed the procedures and applied the guidelines set forth in Section III, Parts A, B, and C, of that Award.

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"... Moreover, we deem it incumbent upon any party

> seeking a meaningful review of the decision of a special board to make such review possible . . . by providing us with an adequate record . . . . By the same token, a party wishing review of a decision by a special board must assume the obligation of providing a verbatim transcript or other satisfactory evidence of the proceedings before that board. If the opposing party refuses to share the cost of a transcript, and the neutral arbitrator determines, in the exercise of his discretion, that a transcript is unnecessary, the party desiring one is nevertheless entitled to have it; but with that right comes the obligation to pay the cost."

A petition to impeach the answers to BRT Questions No. 32(a) and (b) was filed by petitioner, pursuant to Section 9 of the Railway Labor Act as incorporated by Section 4 of P.L. 88-108, in the United States District Court for the District of Columbia (JA 3-13). In an order entered on July 11, 1966, that petition was dismissed by the Honorable Alexander Holtzoff (JA 40), pursuant to an opinion (JA 38-39) in which he concluded, among other things, that the "Court is unable to find that there was an abuse of discretion or that the hearings were so hurried as to constitute a denial of a fair hearing."

The United States Court of Appeals for the District of Columbia Circuit affirmed, in an opinion issued on July 27, 1967. After noting that petitioner's contentions based upon the failure of the special board of adjustment to provide it with a free transcript of the proceedings before the special board had been disposed of adversely to petitioner in earlier decisions "which are controlling and dispositive of these issues" (Pet., App. B, at 4a), the Court held petitioner's contention that it had been deprived of a fair hearing before the special board "to be without merit" (Pet., App. B, at 4a).

The prior decisions thus referred to by the Court of Appeals are its decisions in *Brotherhood of Railroad Trainmen* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, — F.2d —, 55 CCH Labor Cases ¶11,931 (May 19, 1967), petition for writ of certiorari pending, No. 500 (O. T. 1967), and in *Brotherhood of Railroad Trainmen* v. *St. Louis Southwestern Railway Co.*, — F.2d —, 55 CCH Labor Cases ¶11,928 (May 19, 1967), petition for writ of certiorari pending, No. 499 (O.T. 1967). In those cases, the Court of Appeals affirmed the denial of petitions by the Brotherhood of Railroad Trainmen to impeach the answers to BRT Questions No. 32(c) and (d), 33, 36 and 47.[2] Board 282 ruled, in answer to BRT Questions No. 36 and 47, that its Award did not require the special boards of adjustment to make transcripts of their proceedings or otherwise to follow the procedures specified in Sections 7 and 8 of the Railway Labor Act (45 U.S.C. §§ 157, 158), although a party to a special board proceeding was entitled to have a transcript made at its own expense if it so desired. The Brotherhood of Railroad Trainmen contended that Award 282 as so interpreted is invalid because it did not comply with the provision in Section 4 of P.L. 88-108 requiring Board 282 to follow the procedures specified in Sections 7 and 8 of the Railway Labor Act and also because the special boards had to make a transcript of their proceedings in order to comply with the due process clause of the Fifth Amendment

[2] The decision with respect to the answer to BRT Question No. 36 is before this Court on petition for writ of certiorari in No. 500, and the decision with respect to the answer to BRT Question No. 47 is before this Court on petition for writ of certiorari in No. 499. Neither the answers to those questions nor the petitions in Nos. 499 and 500 involve this respondent. The decision with respect to the answer to BRT Question No. 33 is before this Court on petition for writ of certiorari in No. 501. While that answer and petition does involve this respondent, the issues are not related to the issues in this case. This Court has not been requested to review the decision with respect to the answers to BRT Questions No. 32(c) and (d), which answers also involved this respondent.

to the Constitution.[3] The Court of Appeals held that those contentions were foreclosed by the doctrine of *res judicata* since they could have been raised in the proceeding to impeach the validity of Award 282 which was decided adversely to the Brotherhood in a decision which became final in 1964 (see p. 3, *supra*).

Argument

All of petitioner's arguments basically are grounded upon a contention that the Award by Arbitration Board No. 282 is invalid because it has been interpreted by the Board as not requiring the special boards of adjustment to make a transcript of their proceedings or otherwise to comply with the procedural requirements of Sections 7 and 8 (45 U.S.C. §§ 157 and 158) of the Railway Labor Act. However, BRT Questions No. 32(a) and (b)—the only questions here involved—did *not* raise that issue and the Award was *not* so interpreted by Board 282 in answer to them. See pp. 5-7, *supra*. That issue *was* raised and the Award *was* so interpreted in BRT Questions No. 36 and 47. Judgments affirming the dismissal of petitions to impeach the answers to those questions are now pending in this Court as Nos. 499 and 500 (see p. 9, *supra*). But whatever may be the outcome of those cases, the answers to BRT Questions No. 32(a) and (b) plainly cannot be impeached upon a ground which is not raised by those answers.

Petitioner did inquire, in BRT Question No. 32(b), as to whether the hearings before the special board of adjustment were "held under circumstances that deprived the

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[3] While the Court of Appeals did not deem a discussion of the due process issue to be necessary in its prior decisions and that issue is not raised by the petitions in Nos. 499 and 500, that issue was raised before the Court of Appeals in those cases and necessarily was disposed of by the Court's decisions. Thus, in its opinion in this case, the Court of Appeals noted that it had "previously upheld the Board determination that due process was not violated by lack of a transcript . . . ." Pet., App. B, at 4a.

BRT of procedural due process of law," to which Board 282 responded that: "On the question whether the B.R.T. was denied a full and fair hearing, we conclude from our study of the record that the alleged procedural irregularities, considered singly or together, did not deprive the B.R.T. of the minimum essentials of a full and fair hearing."[4] See pp. 5-7, *supra*. One of the alleged "procedural irregularities" which petitioner contended deprived it of "procedural due process of law" was the failure of the special board to have its proceedings transcribed and to make the transcript available without cost to petitioner. To the extent that petitioner is contending that a free transcript is essential to "a full and fair hearing" so as to accord it procedural due process of law as commanded by the Fifth Amendment to the Constitution, an issue which is involved in this case is presented.

This issue, however, is completely lacking in substance. Petitioner was informed by the special board that it could have the proceedings of the special board transcribed at petitioner's own expense, if it chose to do so. Petitioner elected not to exercise that right. Thus, petitioner's contention necessarily comes down to the proposition that it has a constitutional due process right to a *free* transcript of the special board proceedings. This Court has held, of course, that a pauper has a constitutional right to a free transcript in some circumstances. *E.g., Griffin* v. *Illinois*, 351 U.S. 12 (1956). But petitioner does not claim to be a pauper, and neither this Court nor any other court of which we are aware has held that a non-pauper has a constitu-

[4] In its Preliminary Statement of October 10, 1965, Board 282 noted (JA 35) that whether or not "a party has been deprived of due process in the constitutional sense is, of course, a question for the courts," but its review jurisdiction over the awards of special boards of adjustment included jurisdiction to determine "whether either party to a proceeding before a special board was deprived of a full and fair hearing, as that concept is normally understood and applied to ad hoc arbitration proceedings."

tional right to a free transcript. Indeed, it is recognized that a party to an arbitration proceeding ordinarily has no right of any kind to a transcript of the proceedings, absent a statutory requirement or agreement to the contrary. *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203-204, fn. 4 (1956); *Petition of Brink*, 98 F. Supp. 135, 137-138 (E.D. N.Y., 1951), aff'd, 193 F.2d 1009 (2d Cir., 1952); *Commercial Solvents Corp.* v. *Louisiana Liquid F. Co.*, 20 F.R.D. 359, 362 (S.D. N.Y., 1957). In the federal district courts, a party is entitled to a transcript of a proceeding only when he has "request[ed]" one to be made by the court reporter and "has agreed to pay the fee therefor . . .," 28 U.S.C. § 753(b), unless he is a pauper or a transcript has been ordered by the court.[5]

In any event, the court below held that petitioner is foreclosed by the doctrine of *res judicata* from raising the contention that the Award is invalid, either by reason of Sections 7 and 8 of the Railway Labor Act or by reason of the due process clause, because it does not require the special boards of adjustment to transcribe their proceedings and make the transcript available to petitioner without cost. As we have noted (pp. 8-10, *supra*), the court relied upon two of its prior decisions for that holding, which decisions are now before this Court on petitions for writ of certiorari in Nos. 499 and 500.

In the instant petition, petitioner does not assert any reason as to why this Court should review that holding, other than to state that the questions relating thereto (and to the issue on the merits as to whether Sections 7 and 8 are applicable to the proceedings of the special boards), "and their importance, are the same as those questions in another

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[5] Court reporters are now provided pursuant to 28 U.S.C. §753. Prior to the enactment of that statute, however, a party who desired a transcript had to see that a stenographer was present as well as pay for the transcript. *Coulston* v. *United States*, 51 F.2d 178, 180 (10th Cir., 1931).

petition for writ of certiorari pending in this court filed August 16, 1967, *Brotherhood of Railroad Trainmen* v. *Certain Carriers, etc.*, No 499" (Pet., at 10). We think it sufficient, therefore, merely to adopt and incorporate by reference the briefs of the respondent carriers in opposition to the petitions in Nos. 499 and 500, insofar as those briefs relate to the *res judicata* issue, including the demonstration therein that neither P.L. 88-108 nor the Award required the special boards of adjustment to comply with the procedural requirements of Sections 7 and 8 of the Railway Labor Act.[6]

Petitioner also requests this Court to determine "whether the procedure actually followed by the local board was a denial of constitutional due process," because of alleged bias of the neutral member, the locale of the hearings and the time schedule for the hearings, but inconsistently asserts that the absence of a transcript of the special board's proceedings makes "it impossible to determine such issues" (Pet., at 10).

As pointed out above, petitioner could have had a transcript of the special board's proceedings if it had been willing to pay for one. To the extent that the absence of a transcript prevents review of those proceedings, therefore, that is a chance which petitioner took when it elected not

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[6] Brief in Opposition for Respondents Missouri Pacific Railroad Company, Natchez & Southern Railway Company and The Texas & Pacific Railway Company (No. 500), and Brief in Opposition for Respondent St. Louis Southwestern Railway Company (No. 499), the latter of which adopts and incorporates by reference the arguments in the former brief. The petitions in those cases did not raise the due process issue (although it was raised in those cases below), see fn. 3, at p. 10, *supra*, so the briefs in opposition do not discuss the application of the *res judicata* doctrine to that issue. It is well established, however, that that doctrine applies to constitutional issues as well as to other issues, including the rule that a party is precluded from raising in a second suit an issue which was not raised in an earlier suit asserting the same cause of action. *Chicot County Dist.* v. *Bank.* 308 U.S. 371 (1940).

to exercise its right to arrange for a transcript. Insofar as we are aware, the view expressed by Board 282 that a party who desires review of the decision of a special board has an obligation to "make such review possible . . . by providing us with an adequate record" (see p. 8, *supra*) accords with the universal practice of appellate courts. This Court, for example, requires a petitioner for a writ of certiorari to file "a transcript of the record in the case . . ." (Rule 21(1) of the Supreme Court).

Secondly, a record for purposes of review can be prepared by means other than a stenographic transcript. See, *e.g.*, *Herring* v. *Kennedy-Herring Hardware Company*, 261 F.2d 202, 203 (6th Cir., 1958); *Cadby* v. *Savoretti*, 242 F.2d 751 (5th Cir., 1957). Rule 75(c) F.R.Civ.P., for example, provides a means for preparing a record on appeal when "no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable. . . ." In the past, it was common for review to be had on a bill of exceptions which did "not embody a verbatim transcript of the evidence but, on the contrary, a statement with respect to the evidence adequate to present the contentions made in the appellate court." *Miller* v. *United States*, 317 U.S. 192, 198 (1942).

Thirdly, an extensive record of the occurrences during the special board's proceedings and of related matters was compiled in the trial before Judge Robinson in the District Court. See p. 5, *supra*. Upon the basis of that record, Judge Robinson was able to make comprehensive findings of fact and to conclude that petitioner's various allegations are groundless both in fact and in law, including its allegations that the neutral member was biased (237 F. Supp., at 424), that the locale of the hearings was prejudicial (237 F. Supp., at 422-423), and that the time schedule for the hearings allowed petitioner inadequate time to prepare (237 F. Supp., at 419-422). By stipulation of the parties,

the record thus compiled before Judge Robinson was made available to Board 282 for use in its consideration of BRT Questions No. 32(a) and (b), and to the courts below for use in their consideration of the petition to impeach the Board's answer to those questions, and all of those tribunals concluded that petitioner had received a fair hearing. See pp. 5-10, *supra*.

Finally, no attempt has been made in the petition to show that the judgment of the court below is erroneous insofar as it relates to this aspect of the case, or that there is a conflict with a decision of this Court or of some other court of appeals. It is plain, moreover, that at most no more is involved than a determination of the facts in a particular case and the application of settled concepts of law to those particular facts. We submit, therefore, that the issue on the merits of petitioner's due process contentions does not call for an exercise of this Court's discretionary certiorari jurisdiction, particularly in view of the fact that all of the tribunals below which considered the issue, including Board 282, concluded that petitioner received a fair hearing before the special board of adjustment.

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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